

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070855
		TRIAL NO. B-0611759
Plaintiff-Appellee,	:	
		<i>JUDGMENT ENTRY.</i>
vs.	:	
GARFIELD HOWARD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant, Garfield Howard, was found guilty of two counts of murder under R.C. 2903.02(A) and (B) and one count of having weapons under a disability under R.C. 2923.13(A)(3), all with accompanying firearm specifications. The trial court sentenced him to a total of 23 years' to life incarceration. We find no merit in his seven assignments of error, and we affirm his convictions.

The evidence showed that, in the early morning hours, Shane Miller answered a knock at his door. He stepped outside, and his wife, April Miller, heard him say, "I ain't stealing your dope." She then heard four or five gunshots.

Earlier in the day, Shane had told April that someone had accused him of stealing drugs. When Shane stumbled into the house after the shooting, he told her, "[T]he young boy did it." April called 911 and waited for help to arrive. Shane died a few minutes later.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Earlier that day, Howard had told Vincent Brown that his “pack” of drugs was missing and that he was going to shoot the person who took it. Brown told the police that he had seen Howard shoot Shane.

After Shane was killed, Howard’s girlfriend, Britney Wilford, noticed that he was acting strangely. He told her that “he was a bad person.” Eventually, he stated that a man had stolen his “pack” of drugs and that he had confronted the man and shot him in the chest. She told the police about these statements.

In his first assignment of error, Howard contends that he was prejudiced by a structural defect in the indictment. Specifically, he argues that the indictment’s failure to include the essential element of mens rea in count two, felony murder under R.C. 2903.02(B), denied him his rights to due process and a proper jury indictment. This assignment of error is not well taken.

In *State v. Colon (Colon I)*,² the Ohio Supreme Court permitted the defendant to raise the issue of a defective indictment for the first time on appeal. It held that the absence of a mens rea in the indictment, together with significant errors throughout the trial, constituted structural error that warranted a reversal of the defendant’s conviction.³

Subsequently, the court clarified its holding in *Colon I* on a motion for reconsideration. In *State v. Colon (Colon II)*,⁴ it stated that a structural-error analysis is appropriate only in rare cases in which multiple errors at trial follow the defective indictment. Generally, where the indictment is defective because it did not include an essential element and the defendant fails to object, courts should apply a plain-error analysis.

² 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

³ *State v. Sandoval*, 9th Dist. No. 07CA009276, 2008-Ohio-4402.

⁴ 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

This court has discussed the problem of applying the analysis in *Colon I* and *Colon II* to felony murder. We have stated that “felony murder is one of the few crimes in Ohio that has no mens rea element attached directly to it. The mens rea element is found in the predicate offense and does not arise from the catchall culpable mental state of recklessly found in R.C. 2901.21(B).”⁵ Thus, as long as the predicate offense states the mens rea, no error occurs.

In this case, the indictment specified that the predicate offense was felonious assault under R.C. 2903.11, which requires the defendant to act knowingly. Therefore, Howard had notice of the mens rea, and the indictment was not invalid.⁶

Even if we were to find error, we cannot hold that it was plain error, much less structural error. The record does not show that Howard was prejudiced in any way. He had notice of the charges against him, and the state did not contend that mens rea was not a necessary element. Further, he was also convicted of murder under R.C. 2903.02(A). It required the state to prove that he had acted purposely, a much higher standard than knowingly.

We cannot hold that, but for the alleged error, the results of the proceeding would have been otherwise, or that we must reverse Howard’s convictions to prevent a manifest miscarriage of justice.⁷ Consequently, no plain error occurred, and we overrule Howard’s first assignment of error.

In his second assignment of error, Howard argues that the trial court erred in allowing the state to cross-examine its own witnesses with their prior unsworn, out-of-court statements without a showing of surprise or affirmative damage, in violation of

⁵ *State v. Dubose*, 1st Dist. No. C-070397, 2008-Ohio-4983; *State v. Salaam*, 1st Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982.

⁶ *Dubose*, supra; *Salaam*, supra.

⁷ See *State v. Wickline* (1990), 50 Ohio St.3d 114, 552 N.E.2d 913; *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452; *State v. Brundage*, 1st Dist. No. C-030632, 2004-Ohio-6436.

Evid.R. 607(A). This assignment of error is not well taken because the record shows that the witnesses Howard refers to were court witnesses.

Evid.R. 614(A) provides that “[t]he court may, on its own motion or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.” Both parties may cross-examine a court witness, and the prohibition about impeaching a party’s own witness in Evid.R. 607(A) does not apply.⁸

A prime candidate for the application of Evid.R. 614(A) is “an eyewitness who will not cooperate with the party originally planning to call him.”⁹ In this case, the court designated Brown and Wilford as court witnesses. Brown had told the police that he had seen Howard shoot Shane. Wilford had told the police that, shortly after Shane’s murder, Howard had admitted to shooting a man. Both witnesses claimed to be afraid to testify, both failed to show up for hearings, and both had to be arrested and held in custody to ensure that they would testify. Under the circumstances, the trial court’s decision to call them as court witnesses was not an abuse of discretion.¹⁰

Under this assignment of error, Howard also argues that the trial court should not have given the jury transcripts of Brown’s and Wilford’s taped statements to the police. The Ohio Supreme Court has held that a trial court does not abuse its discretion in giving the jury transcripts of taped statements when it instructs the jury that the transcripts are just an aid and that the audio version controls if any discrepancies exist.¹¹ In this case, the trial court properly instructed the jury, and we cannot hold that the trial court abused its

⁸ *Dubose*, supra; *State v. Rogers* (June 19, 1998), 1st Dist. No. C-970190.

⁹ *Dubose*, supra.

¹⁰ See *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144; *State v. Lather*, 171 Ohio App.3d 708, 2007-Ohio-2399, 872 N.E.2d 991.

¹¹ *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, 694 N.E.2d 932; *State v. Lansaw* (Feb. 5, 1999), 1st Dist. No. C-090067.

discretion in allowing the jury to use the transcripts. We overrule Howard's second assignment of error.

In his third assignment of error, Howard contends that the trial court erred in allowing the state to elicit hearsay statements from Shane's wife, April. He argues that the statements violated his right to confront the witnesses against him under *Crawford v. Washington*.¹² In that case, the United States Supreme Court held that the Confrontation Clause bars testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination.¹³

April testified that, right before he died, Shane stated that "the young boy did it." This statement was admissible under the hearsay exception for dying declarations in Evid.R. 804(B)(2). This court has held that a dying declaration is not testimonial hearsay and that its admission into evidence does not violate the accused's right to confront the witnesses against him.¹⁴

April also testified that, earlier in the day, Shane had stated that someone had approached him and accused him of stealing drugs. The trial court allowed this statement into evidence under the hearsay exception in Evid.R. 803(3) for a then-existing mental, emotional, or physical condition. This hearsay statement was not the product of an official examination. Therefore, it was not testimonial within the meaning of *Crawford*, and its admission into evidence did not violate Howard's right to confront the witnesses against him.¹⁵

¹² (2004), 541 U.S. 36, 124 S.Ct. 1354.

¹³ *State v. Robinson*, 1st Dist No. C-060434, 2007-ohio-2388.

¹⁴ *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502. Accord *State v. Duncan*, 8th Dist. No. 87220, 2006-Ohio-5009.

¹⁵ See *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834; *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881; *Robinson*, supra; *State v. Lewis*, 1st Dist. Nos. C-050989 and C-060010, 2007-Ohio-1485.

Howard further contends that the trial court should not have allowed a police officer to testify about what April had told him about Shane's statements. He argues that this testimony involved double hearsay. But the officer did not testify about any statement. He merely stated that what April had told him the day of crime was consistent with her trial testimony. The trial court did not abuse its discretion in allowing this testimony, and we overrule Howard's third assignment of error.

In his fourth assignment of error, Howard contends that the evidence was insufficient to support his convictions. In his sixth assignment of error, he contends that the trial court erred in overruling his Crim.R. 29(A) motion for a judgment of acquittal, which is the same as a claim that the evidence was insufficient to support the convictions.¹⁶

Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of murder under R.C. 2903.02(A) and (B) and having weapons while under a disability under R.C. 2923.13(A)(3), as well as the accompanying firearm specifications. Therefore, the evidence was sufficient to support the convictions.¹⁷

Howard argues that no forensic evidence connected him to the shooting. But no rule of law exists requiring that a witness's testimony be corroborated by physical evidence.¹⁸ He also argues that Brown's and Wilford's testimony was not credible. Matters as to the credibility of evidence are for the trier of fact to decide.¹⁹ We overrule Howard's fourth and sixth assignment of error.

¹⁶ *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, 796 N.E.2d 566.

¹⁷ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 547 N.E.2d 492; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577; *Brundage*, supra.

¹⁸ *State v. Byrd*, 1st Dist. No. C-050490, 2007-Ohio-3787; *Nix*, supra.

¹⁹ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433; *Williams*, supra.

In his fifth assignment of error, Howard contends that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Howard's convictions and order a new trial. Therefore, his convictions were not against the manifest weight of the evidence.²⁰ We overrule Howard's fifth assignment of error.

Finally, in his seventh assignment of error, Howard contends that the sentence was excessive. Following *State v. Foster*,²¹ trial courts have full discretion to impose a prison sentence within the statutory range for the crime committed and need not make findings or give their reasons for imposing more than the minimum, maximum or consecutive sentences.²²

The trial court merged the murder counts and sentenced Howard only on count one, which was murder under R.C. 2903.02(A). On that charge, the court had no choice but to sentence Howard to an indefinite term of 15 years to life.²³ Similarly, the court merged all the firearm specifications into one.²⁴ Again, the court had no choice but to sentence Howard to a three-year consecutive term on that specification.²⁵

The trial court only had discretion regarding the sentence for having weapons while under a disability, which was a third-degree felony. It sentenced Howard to five years' imprisonment on that count, which was made consecutive to the sentence on the murder count and the firearm specification. The sentence was within the statutory range for a third-degree felony,²⁶ and Howard has failed to demonstrate that it was so

²⁰ *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824.

²¹ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

²² *State v. Smith*, 1st Dist. No. C-060991, 2008-Ohio-2561.

²³ R.C. 2929.02(B).

²⁴ See *Russ*, *supra*.

²⁵ R.C. 2929.14(D)(1)(b).

²⁶ R.C. 2929.14(A)(3).

unreasonable, arbitrary, or unconscionable as to connote an abuse of discretion.²⁷ Consequently, we overrule Howard's seventh assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

SUNDERMANN, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 31, 2008
per order of the Court _____.
Presiding Judge

²⁷ See *State v. Clark*, 71 Ohio St.3d 466, 1994-Ohio-43, 644 N.E.2d 331; *Brundage*, supra.